KEYWORD: Guideline E; Guideline K; Guideline M

DIGEST: The Judge noted that the summary was not self-authenticating, was not authenticated by a witness, and Applicant had no opportunity to cross-examine the person who prepared it. At the hearing, Applicant was represented by counsel. During the hearing, the Judge asked Applicant's Counsel whether he had any objections to the admission of GE 2 into evidence. Applicant's Counsel responded, "No objections . . . ." Tr. At 14. In the decision, the Judge indicated that, although the summary was admitted without objection, he would weigh it in light of the issues he highlighted. In the past, the Appeal Board has held that an appealing party must take timely, reasonable steps to raise objections or other procedural matters to preserve them for appeal. Having failed to raise an appropriate objection below, Applicant cannot claim on appeal the Judge's consideration of GE 2 was error. From review of the record, Applicant has not established that the right of cross-examination afforded him in the Executive Order or Directive was denied because the Judge considered GE 2. Adverse decision affirmed.

CASENO: 17-02998.a1

DATE: 07/11/2019

DATE: July 11, 2019

In Re:	)	
	)	
----------	)	ISCR Case No. 17-02998
	)	
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Erin P. Thompson, Esq., Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 9, 2017, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline K (Handling Protected Information), Guideline M (Use of Information Technology), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 12, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Michael H. Leonard denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether his right of cross-examination was denied and whether the Judge's decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact and Analysis

Applicant is 57 years old, is a retired military member, and has worked in the industrial security field for a number of years. The SOR alleged that Applicant mishandled company proprietary information in 2015 when he transferred over 1,600 files to a company-approved external hard drive without authorization. It also alleged that, during an investigation into that matter, Applicant was asked to return the hard drive, intentionally returned another hard drive, and then intentionally and without authorization destroyed the hard drive in question. The Judge found against Applicant on both of those allegations. The Judge found in favor of Applicant on a third allegation that has not been raised as an issue on appeal.

Applicant provides varying accounts of the 2015 incident. This incident came to light after Applicant and other employees had received layoff notices and were placed on elevated computer and email monitoring. Additionally, a retroactive 90-day download report was generated that revealed Applicant's multiple downloads to an external device. When confronted by a company official about the downloads, Applicant denied downloading information to a personal hard drive. He later destroyed the company-owed external hard drive. "The investigation by Applicant's former employer substantiated the allegations of damage to the company's assets and unauthorized downloads." Decision at 6. Applicant resigned in lieu of termination from that former position.

Applicant did not present sufficient evidence to mitigate the security concerns arising from his intentional destruction of a company external hard drive to which he had transferred about 1,600 files, including proprietary information, before beginning another job in the defense industry. There are two main concerns: (1) Applicant gave varying accounts of the incident, and (2) he did not conduct himself as an honest person by not returning the external hard drive to his employer while he still had it. Applicant's transgressions were serious misconduct.

Discussion

In his appeal brief, Applicant cites to "Executive Order 10865[§ 3](6) and DoDD 5220. 6, paragraph 4.3.3" in arguing that his right of cross-examination was denied because he did not have

an opportunity to cross-examine the persons who produced Government Exhibit (GE) 2. Appeal Brief at 2. GE 2 consists of a document from Applicant's former employment record and a summary of an inquiry the former employer conducted into Applicant's downloading of files onto an external device. In the decision, the Judge noted that the summary of the inquiry was prepared more than two years after the incident in question and two days before the hearing was originally scheduled to be held. The Judge stated, "it is obvious that the [summary] was prepared for the purpose of litigation in this case . . . ." Decision at 3. The Judge also noted that the summary was not self-authenticating, was not authenticated by a witness, and Applicant had no opportunity to cross-examine the person who prepared it. At the hearing, Applicant was represented by counsel. During the hearing, the Judge asked Applicant's Counsel whether he had any objections to the admission of GE 2 into evidence. Applicant's Counsel responded, "No objections . . . ." Tr. at 14. In the decision, the Judge indicated that, although the summary was admitted without objection, he would weigh it in light of the issues he highlighted. In the past, the Appeal Board has held that an appealing party must take timely, reasonable steps to raise objections or other procedural matters to preserve them for appeal. *See, e.g.*, ISCR Case No. 03-08813 at 3 (App. Bd. Nov. 15, 2005). *See also* ISCR Case No. 03-00543 at 4-5 (App. Bd. May 21, 2004)(discussing the purposes served in raising evidentiary or procedural objections at the hearing). Having failed to raise an appropriate objection below, Applicant cannot claim on appeal the Judge's consideration of GE 2 was error. From review of the record, Applicant has not established that the right of cross-examination afforded him in the Executive Order or Directive was denied because the Judge considered GE 2.

Applicant challenges the Judge's conclusion that the downloaded files contained proprietary information. In the findings of fact, the Judge stated "Applicant had conducted multiple downloads to a 'possible personal external device,' since September 2015, with more than 1600 files being moved, to include presumed personal files and company files that likely contained company proprietary information (*e.g.*, security-related forms, presentation, templates, and letters)." [Emphasis added.] Decision at 6-7. This finding is almost a verbatim quote (with some minor exceptions such as the deletion of the company's and Applicant's names) from a sentence in the summary of the inquiry (GE 2). In his analysis, however, the Judge stated Applicant "had transferred or moved approximately 1,600 files, which included company proprietary information[.]" [Emphasis added.] Decision at 9. In his brief, Applicant contends that it is speculation that the hard drive in question contained any company proprietary information. Given the nature and quantity of the downloaded files, the Judge's conclusion that proprietary information was included in those files was a reasonable inference based on information in GE 2. At most, the Judge's conclusion was a harmless error because it did not likely affect the outcome of the case. *See, e.g.*, ISCR 11-15184 at 3 (App. Bd. Jul. 25, 2013).

The balance of Applicant's arguments amounts to a disagreement with the Judge's weighing of the evidence. He argues, for example, that his downloading of the files was done in the best interests of the former employer and that he had no intent to harm the former employer. These arguments are not sufficient to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 15-08684 at 2 (App. Bd. Nov. 22, 2017).

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). *See also* Directive, Encl. 2, App A. ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Order

The Decision is **AFFIRMED**.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board